The Law Commission

Working Paper No 51

Transfer of Land
"Subject to Contract" Agreements
3 July 1973

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The Law Commission will be grateful if comments can be sent in by the 1 January 1974.

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93-131-27

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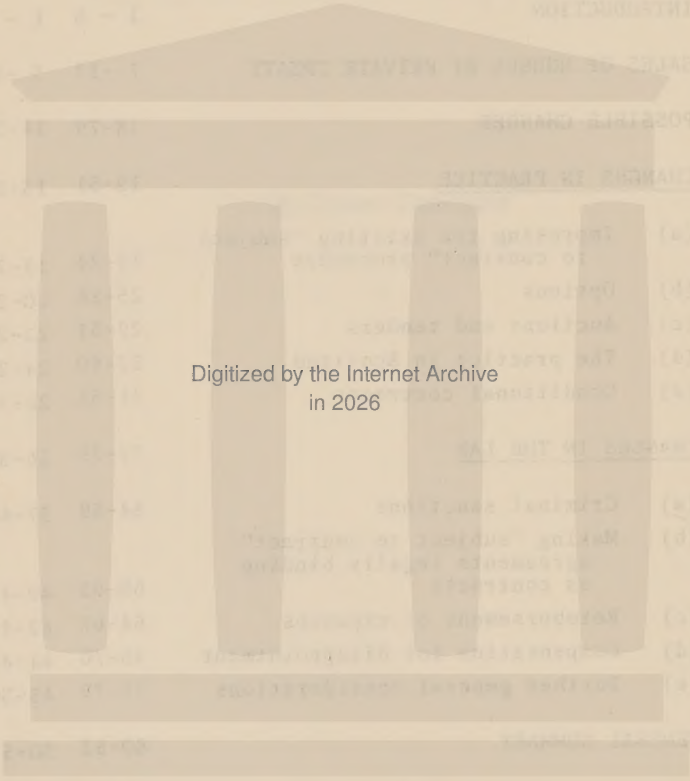

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THE LAW COMMISSION

WORKING PAPER NO. 51

"SUBJECT TO CONTRACT" AGREEMENTS

A. INTRODUCTION

Terms of Reference

1. Difficulties encountered by buyers and sellers of house property, and particulary those experienced recently by buyers as the result of "gazumping", have given rise to concern in and out of Parliament. Accordingly, as was first publicly disclosed in a written answer given by the Attorney General in the House of Commons on 6 December 1971,[1] the Lord Chancellor asked us to consider -

> "the possibility of legislation to prevent a prospective buyer or seller of a house withdrawing from an agreement made "subject to contract" without incurring legal obligation."

2. Since our task involves consideration of what is essentially a matter of procedure, we have felt it right to interpret our terms of reference widely so as to enable us to consider whether the difficulties to which the procedure sometimes gives rise might be capable of solution by a change in practice, rather than by alteration in the law.

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1. Hansard, Vol. 827, col. 228.

"Gazumping"

3. The recent, and unprecedented, boom in the market for houses has increased the incidence of what has come to be known as "gazumping".[2] The term has no very precise meaning in this context. It is generally used to describe the situation in which the seller of a house, having agreed "subject to contract" to sell it at an agreed price, withdraws from the bargain or threatens to do so, in the expectation of receiving a higher price. The prospective buyer who has been "gazumped" is then put in the position either of having to pay the higher price or of losing the house. If he loses the house, any expenditure which he has incurred in anticipation of the proposed purchase will have been wasted. In addition, he will often have been put to a good deal of trouble, and suffer frustration, annoyance and disappointment as the result of what he is likely to regard as sharp practice on the part of the seller.

4. Although gazumping on any scale is a relatively recent phenomenon, cases in which buyers have withdrawn from "subject to contract" agreements have always been common. The buyer may withdraw if he discovers that there is something physically wrong with the property, or because he has not been able to obtain a sufficiently large loan. But there are cases where he may merely have changed his

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2. The origins of the word "gazump" are uncertain. The word, or variants of it, is generally taken to mean to swindle or give short change. Its use in relation to the sale and purchase of houses appears to be very recent. (See Partridge, A Dictionary of Slang and Unconventional English, 5th. ed. (1961) Vol. 1 p. 326, Vol. II Supplement (1970) pp. 1156 and 1160: A Supplement to the Oxford English Dictionary (1972) p. 1207).

mind, or where he never intended to pay the "agreed" price and made his "subject to contract" offer simply to induce the seller to take the property off the market while he endeavoured to get this price reduced. Behaviour of that sort on the part of the buyers is, of course, most likely to occur when market conditions favour buyers, and houses generally, or of particular types, are difficult to sell. By contrast, a strong seller's market provides the conditions in which gazumping is apt to be prevalent. It is, however, significant that even when the recent seller's market for house property was at its strongest, our information[3] was that many more bargains were failing to result in contracts through withdrawals by buyers than through withdrawals by sellers. We have no doubt that in many of the cases in which a buyer withdrew, he did so for a good reason. Nevertheless, this information does correct any impression that in a seller's market it is only the seller who breaks a "subject to contract" bargain.

5. We have carried out preliminary consultations in an attempt to find an appropriate, and workable, solution. Because of the difficulty of the topic, these have necessarily taken time. There is no suggestion that the law of contract or of real property is defective in principle in any relevant respect: true law reform is therefore not involved. What we have to consider is a procedure which has been evolved over the years to meet the requirements of those who buy and sell houses by private treaty[4]

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3. This information was given to us by an estate agent with an extensive practice handling the sale of "second-hand" houses in outer London and the suburbs.

4. By a sale by private treaty we mean a sale other than by auction or tender.

in this country. It is, moreover, a procedure designed primarily to protect buyers rather than sellers, and it is somewhat ironic that buyers should now be complaining of its effects. Their complaints are often, we have no doubt, justified, but the matter must be kept in perspective. The number of cases in which the procedure has enabled a seller to take unjustifiable advantage of a buyer must, we suspect, be very small compared with the number in which it has saved buyers, and particularly those without experience of the pitfalls of house purchase, from "getting their fingers burnt" Buyers of houses need protection because the general rule is that of caveat emptor: let the buyer beware.[5] However, even if the rule were otherwise, the buyer ought, before he concludes an unconditional contract for the purchase of a house, to satisfy himself that it is physically and in all other respects what he wants; otherwise he may find that he is irrevocably committed to purchasing a "desirable residence" which turns out to be anything but desirable.

6. Before considering any possible changes in the law or practice, we must first describe, in some detail, the existing procedure for selling house property in England and Wales by private treaty and the reasons which lie behind it.

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5. A seller has, accordingly, no general duty to disclose physical defects; but in relation to the sale of new houses the effect of the rule has been modified by the Defective Premises Act 1972, ss. 1 - 3.

B. SALES OF HOUSES BY PRIVATE TREATY

The present practice in England and Wales

7. Not all sales of houses by private treaty in England and Wales are effected in exactly the same manner even where, as is usual, an estate agent is employed by the seller. There are, for example, regional variations in the way in which the deposit is paid. In some parts of the country the deposit is almost invariably paid to the estate agent; in others it is usually paid to the seller's solicitors. The procedure which we discuss below may not, therefore, be exactly that which is followed by all agents or in all areas. The principle of agreeing a price "subject to contract" is, however, common to most sales by private treaty in this country.

8. The seller, having decided to put his house on the market through an estate agent, obtains the agent's advice as to the price which he may reasonably expect to get for it. We will call that price the "expected price". The agent then agrees with the seller the price at which the house will be put on the market. We will refer to that as the "asking" price. The asking price is, in normal times, so pitched that the seller ought to get the expected price. Usually, therefore, the asking price will be somewhat higher that the expected price so as to allow some room for downward negotiation; but not so much higher that it may frighten potential buyers away, or give a wholly misleading impression as to the class of house being offered for sale. If the asking price has not been fixed at a sufficiently high figure - as sometimes happens in unpredictable market conditions - offers in excess of the asking price may be received. This can be avoided by an alternative procedure whereby no asking price is quoted, but the agent will, if asked, tell an enquirer the range in which offers are likely to be acceptable. The market

may also be tested by advertising the property for sale by auction, in the hope that it will be sold prior to the date of the auction to the person who shows the greatest interest in it.

9. Whichever method is adopted, the agent is normally under an obligation to tell his client of any offers he receives for the property even though the seller has already "accepted" a lower offer "subject to contract".[6] When an offer acceptable to the seller is obtained, the prospective buyer will be told that his offer has been accepted and he is likely to be asked to pay to the agent a deposit, in normal cases, of not more than 10% of the purchase price. Either in the receipt for this deposit or in some other way it will be stated that the agreement reached is "subject to contract" so as to make it clear that it is not legally binding but is subject to a formal contract being drawn up and signed. On acceptance of a deposit the usual practice used to be that the agent would take the property off the market and tell enquirers that the property had been sold. Now the property will probably be left on the market and enquirers told that it is "under offer" or has been sold "subject to contract".

10. At the stage when the price of a property has merely been agreed "subject to contract" (a stage which we will refer to as "agreement of price")[7] there is no

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6. Keppel v. Wheeler [1927] 1 K.B. 577 (C.A.).

7. This stage is often referred to, somewhat misleadingly, as "acceptance".

enforceable contract between the parties.[8] As a matter of law there is nothing to prevent either of the parties from withdrawing or re-negotiating the price or any other "agreed" term.

11. Although agreement of price produces no contract, many sellers (and probably some buyers as well) will regard themselves as morally bound to enter into a binding contract; but if a substantially higher offer is subsequently received, the integrity of the seller is clearly put under strain. Sachs J.[9] has spoken of:-

> "....this type of "subject to contract" transaction which is so often referred to as a gentleman's agreement but which experience shows is only too often a transaction in which each side hopes the other will act like a gentleman and neither intends so to act if it is against his material interests."

Indeed a seller who is in some fiduciary capacity, such as a trustee or a building society selling under its power of sale, may be required by the law to accept a higher offer.[10]

12. After agreement of price, the terms of the contract are agreed between the parties. This is usual done by their solicitors. The parties do not become legally bound until the terms have been embodied in forms of contract (in identical terms) signed by them and these forms have been physically exchanged.[11] Before contracts are exchanged much has to be done by the parties or their advisers. It is the task of the seller's solicitor to prepare the contract.

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8. See para. 61 below.
9. In Goding v. Frazer [1967] 1 W.L.R. 286 at 293.
10. Buttle v. Saunders [1950] 2 All E.R. 193. Building Societies Act 1962, s. 36(1)(a).
11. Eccles v. Bryant & Pollock [1948] Ch. 93.

To do this he must, among other things, obtain the title documents[12] (or copies or abstracts of them) and see whether there is anything in the seller's title to the property which necessitates the insertion in the contract of any special provisions. It may be that a plan of the property will have to be prepared for attaching to the contract. A plan is necessary where the house is on land which forms part only of that comprised in the seller's title. Where the property is on a new building estate, or consists of a flat in a new block, the matters to be inserted in a properly drawn contract to regulate the rights and obligations of all those who will occupy the estate or building may be complicated and lengthy. Care taken by the seller's solicitor at this stage will often save much time and trouble both in the completion of the transaction and in later years.

13. After the seller's solicitor has submitted the contract, in draft, to the buyer's solicitor, his main function, apart from settling any amendments required by the buyer, will, until contracts are exchanged, be that of dealing with enquiries sent to him by the buyer's solicitor. The responsibility of the buyer's solicitor, at this stage, is probably greater than that of the seller's. The seller's main interest is to get his money and, provided he does so, that is usually an end to the matter. The buyer, on the other hand, is probably buying the house to live in and he will want to be sure that there is nothing which might adversely affect its use and enjoyment as his home. That is the buyer's primary concern at the time of the purchase. In the longer term, it is just as important to him that there are no factors,

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12. Where the property is mortgaged, the documents will be held by the building society or other lender, and arrangements will have to be made for the seller's solicitor to have access to them. In the case of a property where the title is registered at H.M. Land Registry, the Land or Charge Certificate (or a copy) will have to be referred to.

discoverable when he purchased, which might depress the value of the property if at any time he wishes to sell it. It is the task of those advising him to find out what matters may adversely affect the property and to advise him as to their implications. Among the many things on which a buyer needs to be satisfied before he is irrevocably committed to his purchase are:[13]

(a) That the property is free from unacceptable physical defects and that there is nothing in the construction or arrangement of the property which might prevent the buyer from using or altering it as he intends. (He may, for example, wish to add an extra room). For these purposes, the advice of a surveyor or architect may be needed.

(b) That he can raise the money needed to complete the purchase. If he is proposing to borrow money on mortgage, the lender will have to be satisfied that he is creditworthy for the amount of the loan, and that the property is an adequate security for it. For the latter purpose, a survey will be carried out on behalf of the lender, but at the expense of the buyer.[14]

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13. Questions relating to the title of the property, unless referred to in the contract, are usually dealt with after exchange of contracts. If the seller's title to the property is incurably defective, the buyer can usually withdraw from the bargain.

14. See also para. 22 below.

(c) That there are no public matters which adversely affect the property and that the use or uses to which the buyer intends to put the property are permitted under any relevant statutory or other requirements. He will not wish to buy a property for occupation which is, for example, likely to be purchased compulsorily by a public authority. If he owns a car but there is no garage, he may wish to be assured that he will be permitted to put up a garage on that part of the property described by the agent as "space for garage". Road-widening proposals or the projected route of a new motorway near the property might affect his decision whether or not to buy the property. To find out about matters of this kind, the buyers's solicitor will make searches and enquiries of the local authorities; but he may also suggest that his client or somebody on his behalf ought to make additional enquiries at the Town Hall.

(d) That where the property is sold subject to a tenancy of the whole or part of it, full particulars of that tenancy are ascertained, so that, for example, the buyer will know what are his chances of obtaining vacant possession of the part occupied, if he so wishes. He will clearly need advice as to what will be his position; a mere statement of the facts supplied by the seller's solicitor, however full and accurate, will not be sufficient.

(e) That he knows about matters which may benefit or burden the property. If it is sold subject to or with the benefit of a right of way he will wish to know its exact route and for what purposes it can be used. If the property is sold subject to a covenant which appears to restrict the use of the property, he may wish to know how far it can be enforced. If the property is apparently entitled to the benefit of a covenant restricting the use of an adjoining property, it may be important to the purchaser to know whether he will be able to enforce it or not.

(f) That if the property is leasehold, the terms of the lease are acceptable and do not, for example, preclude the use of the property for some purpose envisaged by the buyer. The lease may perhaps prohibit the taking in of lodgers or the use of the premises as consulting rooms. If the transaction consists of the grant of a new lease at a premium, the provisions of the lease will have to be settled and agreed between the parties before the contract is entered into.

14. We have indicated some of the things which may have to be done by or on behalf of the parties between

agreement of price and the actual exchange of contracts.[15] To protect the parties from risk it is absolutely necessary that such steps (where relevant) should be taken before they are legally committed to the transaction. Buying and selling houses are the most important financial transactions that most people enter into and their advisers are right to discourage them from taking unnessary risks.[16] If the present safeguards were to be removed, and pre-contract enquiries, inspections and investigations cut down, we have no doubt that many sales and purchases of houses might, in fact, be achieved without great difficulty or subsequent trouble for the parties. But some clearly would not be so achieved; and in such cases the consequences to the parties

15. We are concerned only with what happens up to the stage when there is a binding contract. Very briefly, the proceedings thereafter comprise the investigation of the seller's title, the preparation of the conveyance (or transfer) and mortgage, apportionment of the outgoings and actual completion, which consists of an exchange of documents for the purchase and/or mortgage monies. After completion the stamp duty (if any) on the documents is paid and if the title is, or has to be, registered they are lodged at H.M. Land Registry. Between contract and completion the parties themselves will make their removal arrangements, which may have to be synchronised with those of other buyers and sellers.

16. A practice which has sometimes been resorted to in connection with the sale of houses is for the seller to send draft contracts simultaneously to a number of prospective buyers and to tell them that the first buyer to exchange contracts will secure the property. These "contract races" are actively discouraged by The Law Society. They are likely to encourage the over-anxious buyer to take unnecessary risks by dispensing with the usual enquiries and inspections.

could prove disastrous. The fact that buyers and sellers of houses (and their mortgagees) are professionally advised in almost all cases leaves little opportunity for fraud; moreover, it accounts for the fact that there are very few properties the titles to which are seriously defective. In the majority of cases in which a purchase turns out to be unsatisfactory it is physical or environmental factors rather than fraud or defects in title that are likely to be the cause.

15. Most of the time between the agreement of price and exchange of contracts is taken up in carrying out the normal pre-contract procedures designed, as we have shown, to minimise the risk of trouble later; but there is another matter which often has the effect of holding up exchange of contracts. This is the fact that sales and purchases frequently have to be synchronised. The seller of one house is often the buyer of another and his resources may be such that he cannot commit himself to buy the other house until he knows he has definitely sold his own. Moreover, on any one occasion each of the parties is likely to be both a buyer and a seller. A particular transaction may, in fact, be only one in a chain of similar transactions where each is dependent on the next. These chains of dependent transactions complicate and delay very many seemingly straightforward sales and purchases of ordinary houses.

16. There is another important consideration that must be borne in mind. It is that the estate agent is the agent for the seller, not the buyer. It is the seller who remunerates him and his job is to get a good price for the seller. He is thus a salesman, albeit in some cases a member of a profession as well, and as such he is not under an obligation to advise the buyer either as to the price or as to what the snags may be. Moreover, it is open to

to anybody to set up business as an estate agent, whatever his record, experience and qualifications (or lack of them). For this reason alone it is essential that a prospective buyer should obtain independent advice. Even if the agent is scrupulously fair in his dealing with an enquirer, he may not know what it is that is wanted or whether, for example, the necessary mortgage moneys will be forthcoming. In fact, the well-known professional bodies whose members are estate agents support the policy of The Law Society that an unadvised buyer should not be asked to sign a binding contract to purchase a house.[17] We think too, that the public is, by and large, becoming educated not to sign documents in estate agents' offices unless they contain the "subject to contract" formula. Nevertheless, agents tell us that when houses are in short supply some buyers would be willing to sign almost anything put before them if they thought that by so doing it would secure their purchase.

17. The question which we have to consider, therefore, is whether there is anything which can be done to deter or prevent buyers and sellers of houses from letting each other down without a valid reason, whilst at the same time preserving the safeguards built into the existing procedure. In the remainder of this paper we examine various possibilities.

C. POSSIBLE CHANGES

18. In this part of the paper we look at possible changes which fall into two categories. In Part I we cover topics not involving legislation and in Part II we discuss suggestions which could only be implemented by legislation.

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17. See e.g. (1966) 63 Law Society's Gazette 267.

I. CHANGES IN PRACTICE

(a) Improving the existing "subject to contract" procedure

(i) General Considerations

19. The longer the interval between agreement of price "subject to contract" and exchange of contracts, the greater the chance of one party letting the other down. If it were possible to reduce this interval, without inhibiting proper enquiries by the buyer, this would help. The Law Society and the Building Societies Association in suggesting improvements to the existing procedure clearly recognise this. However, not all the matters which may delay a proposed transaction are within the control of the solicitors to the parties, or their lenders. For example, the time taken by local authorities to deal with searches and enquiries is a vital factor and so is the ready availability of surveyors and valuers. We have also mentioned the need to synchronise sales and purchases as a factor which frequently precludes the parties from concluding a binding contract at the time when the price is agreed.

(ii) Seller's Surveys

20. There is one suggestion which is frequently made for improving the procedure which we think ought to be discussed in some detail, because laymen, in particular, tend to be attracted by it. It is that a survey of the property should be carried out by a qualified surveyor instructed by the seller. The surveyor's report in an approved form would be made available to any person interested in the property and it is sometimes suggested that it should be paid for by the person who ultimately buys

the property.

21. The advantage of the proposal, if adopted, would be that if purchasers and potential lenders came to rely on such a survey as a matter of course, one of the factors which delays exchange of contracts under the present procedure would be eliminated. It would also save the expense of employing two surveyors in those cases in which both the purchaser and his mortgagee now have separate surveys. It would also avoid having more than one survey in any case where there was a succession of prospective buyers each of whom might otherwise have borne the cost of a separate survey.

22. Attractive as the proposal may be in theory, we think that from a practical point of view it has such serious drawbacks that we could not recommend it. Our reasons are as follows:-

(a) Seller's surveys will save time and expense only if buyers and their mortgagees feel they can rely on them. The main objection to the proposal is that we do not think that it is realistic to expect buyers and mortgagees to have full confidence in any survey that has been obtained by the seller, whatever the qualifications of the surveyor. The interests of the seller, on the one hand, and those of the buyer and his mortgagee, on the other, are in direct conflict, particularly where advice is sought as to the value of the property in question. It would be unreasonable to expect such advice to be found in a seller's survey and yet it will always be required by a lender and will sometimes be wanted by the

buyer. Moreover, the seller may not wish to show to a potential buyer a report which finds fault with his property or makes it look as if he is asking too high a price for it; but it is just such a report that the buyer would like to see and make use of in negotiations. It is unlikely that any system of seller's surveys could replace the present system under which those who require surveys obtain them for themselves.

(b) Even if that objection did not exist, we do not think that any standard form of survey would satisfy many of those who now obtain a separate survey for themselves. We are told that those who buy their houses with the help of a mortgage from a building society rarely obtain separate surveys - and this accounts for a very high proportion of buyers of houses. The buyer who is likely to want his own survey will usually be a person of some means buying a more expensive property. Such a person will, we think, almost invariably want the survey carried out by somebody of his choice and on his specific and, perhaps, detailed instructions. Not only will he want to know that the property is structurally sound but he is likely to require advice on the seriousness or otherwise of defects that the survey may reveal and to know how much it will cost to remedy them. Alterations may be envisaged, and the surveyor's advice as to whether or not they are feasible will be needed. We cannot see a seller's survey being suitable for this type of buyer.

(c) Any standard form of surveyor's report, if it were to have any chance of being generally accepted, would have to deal with everything that even the most meticulous buyer (or mortgagee) might want to know about the property. It would presumably have to cover matters such as the state of the wiring and the drains - matters on which a surveyor will usually have to obtain the opinion of somebody else. This would all add to the cost of the survey.

(d) So far as those lending money to buyers of houses are concerned the survey which they want is essentially different from that which a prospective owner-occupier of a house requires. It is likely to be more in the nature of a valuation than a full survey. The lender is not going to live in the house. All he wants to know is that if the buyer defaults on his payments the house can be sold for such a sum as will enable the outstanding loan, interest and any costs to be recovered.[18] Representatives of building societies tell us that for their purposes the qualifications of the surveyor are of secondary importance. What they want is the advice of somebody who is known to them to be knowledgeable on property values in the locality. A seller's survey would be unlikely to be suitable for their purposes.

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18. The essentially different nature of a building society survey is reflected in the fact that it is carried out for a much smaller fee than that charged for a full survey.

(e) The survey obtained by a lender is almost invariably paid for by the borrower. Those buyers who at present pay only for the mortgagee's survey would not, we are sure, welcome the possibility of having to pay for a much more expensive seller's survey as well.

(iii) Other possible improvements

23. The use of seller's surveys, even if that were to become the general practice, would not necessarily reduce the interval of time between agreement of price and exchange of contracts because the obtaining of a surveyor's report or mortgagee's valuation is only one of a number of time-consuming things which are done during that interval. Local searches and enquiries have to be made and may take several weeks. Some suggestions for speeding up the procedure which have been made by The Law Society and which we support in principle include the following:-

(a) That sellers and their agents should be encouraged to instruct the seller's solicitor when a house is put on the market so that there will be no delay in preparing the contract when a buyer has been found.

(b) That local searches and enquiries should be made by the seller's solicitor and made available to the buyer.[19]

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19. This is a matter to which we will be referring in a report which we will be making on Local Land Charges.

24. Improvements to the system with a view to speeding it up are helpful in that they reduce the period of time in which gazumping (and its converse) can take place. But so long as any interval remains between agreement of price and exchange of contracts it is open to one party to let the other down. If, therefore, gazumping is to be countered by a change in procedure, it seems to us that a new procedure altogether would have to be devised. Later, we will examine such a new procedure, but first we will consider some other methods of selling houses which are in current use in this country; and also the Scottish procedure. None of these methods allow of the possibility of gazumping and all could be used for the sale of any type of house property without any change in the law. Whether or not they are suitable for general use here is the main point which must be considered.

(b) Options

25. A suggestion frequently put forward for dealing with the problem of gazumping is that the seller should grant to the buyer a binding option giving him the right to purchase the property at a specified price, such option to be exercisable by the buyer within a stipulated period.[20] During that period the buyer could make his enquiries and other arrangements, and then decide whether to exercise the option or not. The seller would thus be precluded from accepting any other offer while the option was exercisable.

26. The grant of an option gives the seller no assurance that the property will be purchased by the person in whose favour it is granted, because he does not know whether or

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20. The objections of the Council of The Law Society to the general use of options are set out in the Memorandum part of which is reproduced in the Appendix.

not it will be exercised. It does, however, preclude the seller from selling the property to anyone else during the period in which the option can be exercised. By granting an option the seller is thus put at a disadvantage and he may wish to be compensated, usually by requiring the grantee of the option to pay for it. The amount the seller might ask would be a matter for negotiation, but in a rapidly rising market one would naturally expect the price to be substantial. Options, for that reason alone, would seem to provide no general solution to the problem of gazumping. Moreover, the fact that an option gives the seller no assurance that the property will be purchased makes it unsuitable for use by a seller who needs to be sure that his house is sold before binding himself to purchase another.

27. In any event, the use of options gives rise to a serious practical difficulty, particularly in those cases in which the buyer is not in a position to take any risk that he may lose the money he has paid for the option. An option gives the intending buyer the right, by giving notice to the seller that he wishes to exercise it, to bind both the seller and himself to an immediate and legally enforceable contract for the sale and purchase of the property. Since this contract will come into existence automatically on the exercise of the option, the terms of the contract must be settled in advance and be embodied in the option agreement itself. The buyer would be well advised, therefore, to obtain legal advice as to whether those terms are adequate and fair and to make all the necessary inspections and enquiries before he enters into the option. If he takes those steps after acquiring the option he may discover matters which would dispose him not to exercise the option and in that event he will have wasted the money paid for it. In other words there would

often be the same period of delay before the option was entered into as now occurs before the legally binding contract is entered into - and during that period gazumping could still take place.

28. We are not suggesting that options can never be useful. On the contrary they are not infrequently used to advantage in commercial or investment transactions where circumstances are quite different from those surrounding the normal purchase and sale of houses for owner occupation. All we are saying is that options do not, in our view, provide a generally suitable alternative to the "subject to contract" procedure. If buyers and sellers of property wish to make use of them they are perfectly free to do so, although we doubt whether their use by buyers who have not first had proper professional advice should be encouraged.[21]

(c) Auctions and tenders

29. Where a house is sold by auction or by tender, there is no period of negotiation. By bidding at the auction or in submitting his tender, the prospective buyer agrees to the terms on which the seller has invited offers. In either case, once an offer is accepted both parties are bound by its terms. Gazumping or the converse thus cannot arise. The main disadvantage of both procedures is that they offer no protection to the unadvised buyer. He may not have made any proper enquiries or inspection of the property, or obtained any advice; but if his bid or offer is accepted, he will be bound in law to complete the purchase and may be

21. An arrangement which has some similarity to an option is the grant of a right of first refusal. All that this usually amounts to is an agreement (often, in fact, unenforceable) under which the seller agrees with a particular person not to sell his property to anybody else without first giving that person an opportunity of purchasing it. Such an agreement has no relevance in the context of this paper since it places the seller under no obligation to sell the property.

liable in damages if he does not do so. Even if there is nothing wrong with the property itself he may find himself unable to finance the purchase. The fact that a property is offered for sale by auction or tender does not mean that a potential buyer can safely bid or make an offer without taking all the steps that he should normally take before exchange of contracts in the case of a sale by private treaty. On the contrary, the taking of those steps is just as necessary; but an unadvised buyer may well fail to appreciate this.

30. The bidding at an auction takes place in public and this provides some safeguard that the sale is not rigged against the buyer or seller. By contrast, tenders are usually submitted by letter, and unless the operation is properly regulated, the opportunity for abuse is always present. The recipient of the letters, or perhaps a clerk in his office, might, for example, open the letters as they were received and tip off a friend of his as to the price he should offer to make sure that he secured the property. We have no evidence that this sort of abuse is in fact taking place, but we feel it is right to mention the possibility of it.

31. One of the advantages of the "subject to contract" procedure is that the buyer can make his offer before incurring substantial expense in the knowledge that even if his offer is "accepted" he will not be bound by it. Costs that he incurs thereafter will be wasted only if he decides not to go through with the purchase or if the seller backs out. But where the sale is by auction or tender, every unsuccessful bidder will have thrown away all the costs which he has incurred before making his offer, including those of any survey which he or his mortgagee has had carried out. They may also be thrown away if, as quite often happens, the property is sold to somebody else by

private treaty before the date fixed for the auction.

(d) The practice in Scotland

32. We have often heard it said that the procedure for buying and selling houses in Scotland is simpler and better than it is in England and Wales, and that the parties enter into a binding contract at a much earlier stage. Our enquiries confirm that, in straightforward cases, this is true. It is, therefore, necessary for us to examine the Scottish procedure in some detail to see whether we can learn from it.

33. The agreement of a price "subject to contract" (as we know it here) is extremely rare in Scotland. Their normal procedure is not unlike a sale by tender, but it is usually the prospective buyer who prescribes the conditions of sale and the seller who decides whether or not to accept them. The contract itself is generally recorded in an exchange of letters. The sequence of events leading to a contract is, we are told, likely to be as follows:-

(a) The property is advertised for sale by the seller's agent who is often, in fact, his own solicitor. Sufficient information is given to identify the house which is for sale.

(b) Enquirers are given detailed particulars, which include certain basic facts that a prospective purchaser will need to know, for example:-

(i) a description which defines the property,

(ii) the rateable value,

(iii) obligations and liabilities subject to

which the house will be transferred, and

(iv) details of all tenancies.

At the same time the enquirer will be told the closing date for offers. He is often given an indication of the price expected or told that offers must be over a stated figure.

(c) When there is a ready market, the period between advertisement and the closing date for offers is likely to be two-or three weeks. This is to enable the buyer to arrange for a survey and to organise his finance.

(d) The prospective buyer makes an offer, normally by a formal letter which includes:-

(i) a description of the property,

(ii) the price,

(iii) the date of entry,

(iv) the rateable value,

(v) the known liabilities, such as unavoidable annual payments or neighbour's rights over the property,

(vi) a stipulation for delivery of a valid conveyance and a good marketable title and clear searches, and

(vii) any special conditions that the buyer requires.

(e) The seller can then conclude the contract by writing a letter which is an unqualified acceptance, or he can write a letter which is only a qualified acceptance (which, at law, is a counter offer), possibly because it seeks a higher price. The

correspondence may continue until both parties are agreed on all the terms when there is a binding contract on the correspondence.

(f) The investigation of the title and detailed enquiries are made after there is a contract and, as in England, the completed documents are delivered in exchange for the purchase price when possession is given to the buyer.

34. This procedure is relatively flexible; we have been shown a contract by correspondence in which the offer was made by the seller's solicitor, and this was accepted by the buyer. The striking contrast between the Scottish and English procedures lies in the fact that Scottish lawyers advise their clients to enter into binding contracts at a very much earlier stage and in a very much simpler form. Many of the enquiries and searches which in this country are almost invariably made before contract are in Scotland confidently left until the time between contract and completion. If things do go wrong they must be put right on general principles of the law without the detailed specific conditions which would almost certainly apply here.

35. The Scottish practice assures the parties of a bargain at an early stage, and it has been found to work satisfactorily in ordinary straightforward cases. Its defect, we are told, is that if there are any unexpected difficulties they are likely to arise after there is a binding contract and it is then very much more difficult to overcome them. It may not be possible to withdraw from a bargain for reasons which might have been good reasons for not having entered into it. If however it is anticipated that the transaction is likely to be complex or difficult, many more details are in fact dealt with before the offer

is unconditionally accepted.

36. Forty or more years ago, the practice in England and Wales was much more akin to the Scottish procedure than it is now. Contracts in straightforward cases were sometimes very simple and drawn without reference to complicated and comprehensive conditions of sale; searches and enquiries were seldom made before contract, and purchasers were content to rely on enquiries made between contract and completion.[22] Why has the English practice changed? Changes of this sort do not occur for no reason, and the answer to that question will enable us to evaluate the suitability of adopting the Scottish procedure (or something more like it) south of the border.

37. During the last forty years there has, in England and Wales, been a great increase in the spread of home-ownership. This tendency has not, as yet, been so noticeable a feature in Scotland where people have often preferred to rent rather than buy their homes. At the same time, the supply of houses here has not kept pace with the demand, and prices accordingly tend to be high. In the result, there has been a striking increase in the number of people of limited means buying their homes with the assistance of a mortgage covering a substantial part of the pur-

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22. In this connection, it is interesting to note that the Statutory Form of Conditions of Sale which was published on 7 August 1925 and which applies to contracts by correspondence (Law of Property Act 1925, s.46) would nowadays, we think, be regarded as unsuitable for use by an unadvised seller or buyer. Presumably, however, when they were introduced, they must have been thought to provide sufficient safeguards for the amateur conveyancer, bearing in mind that when they apply it is likely to be in a case where a transaction has been concluded, perhaps accidentally, between laymen.

chase price. Such people especially cannot afford to take financial risks, and accordingly a procedure has evolved which, so far as practicable, minimises the risks which the ordinary buyer of a house, and anybody lending to him on its security, might otherwise run.

38. Another feature of the last forty years has been the increase in the impact of planning legislation and in the amount of public works. It is, therefore, much more important than it used to be that a buyer should make his local searches and enquiries before, rather than after, he is bound by contract.

39. The increase in home-ownership (coupled with a fairly high rate of turnover) has had another, perhaps less obvious, effect. Because of the sheer volume of work, conveyancing has tended to become more and more impersonal. The former procedure was undoubtedly less meticulous and it must often have worked only because personal relationships between all those involved in the transaction were closer. In modern conditions in England a more detailed procedure is safer. By contrast, we understand that in Scotland there is still a great deal of personal contact not only between solicitors but also between them and surveyors, local authority officials, the banks and building societies. The fact that it is common for estate agents' work to be done by solicitors in Scotland also helps the parties to have confidence in one another, as well as simplifying matters.

40. Conditions have changed so much in recent years that we do not think that the English procedure could safely revert to its older form; and for the same reason we do not think that the Scottish procedure is really relevant to us. This is not to say that conveyancing transactions could never be carried out in England on Scottish lines; indeed, there must be many every year which turn out to have been so simple

and straightforward that, with the benefit of hindsight, one could say that they could have been carried out safely under the Scottish procedure. But a procedure for general use has to be appropriate to almost all cases; and it is difficult to tell in advance whether a particular transaction is one in which it would be safe to cut corners. In any case, the Scottish procedure is a form of tender and, as we have already indicated, we are not generally in favour of the use of the sale by tender for selling houses here. The particular feature of the Scottish practice that would not, we think, have been welcome here in recent conditions where many potential buyers were after the same property is that all but the successful buyer will have wasted any expense he incurred before making his offer.

(e) Conditional contracts

41. Options, auctions and tenders and the Scottish practice are all, as we have pointed out, means of conducting sales and purchases of property which could be used to replace the usual procedure here. Since they are not, in our view, suitable for general use in place of the existing procedure, is there some other procedure which would be both preferable and workable?

42. The first step in the search for any such procedure must be to ask what it is that sellers and buyers of houses want. We have little doubt that the great majority of both are agreed on the answer to that question. It is that when an offer for a house has been made and accepted at a stated price, neither party should be allowed to go back on that bargain without a valid reason. The seller's main interest is, and always has been, to get the agreed price as soon as possible, whilst giving himself time to get another house and to move into it. The buyer, on the other hand, having

agreed the price wants to know that he can stop house-hunting and concentrate his energies and attention on the house he has bought.

43. Thus, buyers and sellers would probably like to be able to enter into some form of contract at the time when the price is agreed. The contract would be binding on both parties, but the buyer would be able to withdraw, without liability, if he could not finance his purchase or if the usual enquiries, searches, inspections and investigations showed that there was something substantially wrong with the property. In other words what the parties are looking for is some form of conditional contract.

44. Although it is not difficult to state in outline what such a conditional contract might contain, it is a much more difficult matter to devise terms that will invariably be fair to both parties whatever the circumstances. We regard it as absolutely essential that any form of contract that has our blessing should be absolutely safe in its effect, even if used by the most unsophisticated house buyer. It would also have to be appropriate for use in a very wide variety of circumstances and for different forms of property. It would have to apply, for example, to new houses and old, to land on which a house is to be built or is in the course of erection, to registered and unregistered titles, to freehold and leasehold property, to land which is only part of that comprised in the seller's title, to flats, to land which is subject to tenancies and other burdens and to the situation where one or other of the parties (or both) is not free to commit himself until he has disposed of, or bought, another house.

45. Consideration of conditional contracts in the field of house purchase is no new development. For many years The Law Society's Conditions of Sale, in editions no longer current,[23] contained a condition for optional use, making the contract, in effect, subject to the results of the buyer's searches and enquiries of the local authorities being satisfactory. The National Conditions of Sale contained, and still do contain, a similar condition[24] and in a previous edition provided an optional condition making the purchase subject to the purchaser obtaining a loan of a specified amount from a named building society.[25] The conditions have never been extensively used. They are designed to save time and to make the contract firm at an earlier stage than under the usual "subject to contract" procedure; but since they deal with some only of the matters a purchaser has to take into account before he commits himself, no time is, in practice, saved. Moreover, sellers, and particularly sellers who need a binding contract to enable them to synchronise the sale with the purchase of another house, find conditions of this kind unacceptable because they do not make the contract sufficiently firm. A buyer who has changed his mind may perhaps be able to withdraw from the bargain on the pretext that he was unable to get the necessary loan.

46. Some years ago, the Lord Chancellor asked The Law Society to consider whether it might be possible to replace "subject to contract" agreements with options or provisional (i.e. conditional) agreements. The Council of The Law Society, having considered the matter in detail, concluded that neither of these could satisfactorily replace the existing procedure. Their reasons were set out in a Memorandum dated May 1964.

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23. e.g. 1959 Edition, General Condition 21.

24. 18th Edition, condition 13.

25. 17th Edition, condition 9.

In the Appendix to this paper we reproduce that part of the Memorandum which sets out those reasons. (Also reproduced is a form of provisional agreement for the sale and purchase of a private dwellinghouse which was, by way of example, set out in an appendix to the Memorandum but which was not recommended for actual use.) Although the Council's reasons are convincing, we nevertheless felt that, since the public demand still seemed to be for some kind of conditional contract, we ourselves were bound to look at the matter again.

47. Accordingly, with the help and co-operation of The Law Society, we have investigated the matter afresh. What we attempted to do was to devise a form of conditional contract which could safely be entered into by members of the public for the sale and purchase of their houses,[26] as soon as they had reached agreement on the price and without having first taken professional advice. A great deal of detailed work was done on this by The Law Society, as well as by us, and we are grateful to them. But the attempt failed and we are forced to accept that a satisfactory form of conditional contract for general use in the sale and purchase of houses cannot be devised. Apart from a number of detailed objections which would, we think, be very difficult to overcome, there are perhaps three main obstacles.

(i) Protection of the buyer

48. At the time when the price for a house is agreed "subject to contract", the buyer will in many cases have

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26. It was not considered that any standard form of contract could satisfactorily cover houses which had not yet been built or which were in the course of erection. The form was, therefore, only designed to apply to the sale and purchase of "second-hand" or completed houses.

had no professional advice and will have decided to make his offer on the basis of his own, perhaps cursory, inspection of the property and of any enquiries he has made. Many buyers of houses, and particularly those who are buying a house for the first time, have very little idea of the complications and hidden pitfalls of house purchase[27] or how to negotiate a proper price. It is essential therefore for the protection of buyers that any form of contract for general use should be framed in such a way that the existing freedom to withdraw from the negotiations is substantially unimpaired. And any form which is so framed must, we have found, be one which no seller would be wise to enter into, since it would amount to little more than an option for the buyer to purchase the property at a certain price. It has to be recognised that any form of contract which would suit a seller would almost certainly give insufficient protection to the unadvised buyer. Although it is the buyer who, under the existing procedure, is in particular need of protection, sellers may also need protection from accepting a binding commitment to sell their houses before obtaining professional advice.

49. The elimination of risk for those buying (and selling) their houses is regarded by their advisers - and in our view rightly so - as an essential feature of any procedure for sale and purchase. One risk which is always present is, of course, the risk that the other party will withdraw from the negotiations before a contract is concluded; but there are, as we have shown, other risks (especially for buyers) and professional advisers are of the general opinion that the latter risks are the more dangerous. It would clearly be unwise to adopt a new procedure which, while eliminating

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27. The Legal Side of Buying a House published by Consumers' Association explains in layman's language the procedure for buying and selling a house.

to some extent the risk of withdrawal after prices have been agreed, does so by exposing the parties to other risks of a more serious nature.

(ii) Co-ordinated transactions

50. Even supposing that it were possible to devise a form of conditional contract satisfactory to both seller and buyer, the fact that it did not bind them to complete the transaction unless the conditions were fulfilled would inevitably give rise to a period of uncertainty, the duration of which was itself uncertain. This uncertainty would be considerable because the conditions would have, on any view, to cover the physical condition of the property, the availability of mortgage finance and all the other pre-contract matters to which we have referred in paragraph 13 above. And while this uncertainty continued neither party could safely assume that the transaction would proceed. The second main obstacle arises, then, because of the effect of this situation on the point already mentioned in paragraph 15 - namely , the need for a party who is a seller in one transaction to synchronise that transaction with another transaction in which he is the buyer. When this need exists, and it probably exists more often than not, the parties to both transactions must become bound at the same time and bound, moreover, to complete them at the same time. There is obvious difficulty in achieving this within a system of conditional contracts.

(iii) Disputes

51. The uncertainty which must exist unless and until the conditions of a conditional contract are fulfilled is described in the proceding paragraph. But there may often be another kind of uncertainty: the uncertainty as to whether the conditions have been fulfilled or not: and this latter uncertainty might result in disputes between the parties

which would have to be resolved. Whether a survey report was bad enough to justify the buyer withdrawing, whether he had tried hard enough to raise the necessary mortgage finance - these and many other questions would, we suspect, frequently become bones of contention between the parties.

II CHANGES IN THE LAW

General

52. So, far, all the matters which we have considered involve no change in the law. In this part of the Paper we will discuss ideas the implementation of which would require legislation. We think it as well to say at once that we are by no means convinced that the answer lies in legislation. We do not underrate the distress and inconvenience that can be caused when either party to a "subject to contract" agreement is let down by the other; but as we shall indicate, changes in the law in this field would tend either to offend currently accepted general principles or to provide no real solution to the gazumping problem. There are, moreover, difficulties in the field of definition and if any change in the law is to be both effective and fair the legislation would not be simple. We propose therefore to set out the alternatives which appear to fall within the field of choice, and to comment upon them; but whether, in the light of those comments, it can be said that gazumping is such a social evil that it is necessary that one or more of those alternatives be adopted is, we think, a matter of broad public policy upon which the views of lawyers carry no more weight than those of anyone else. Nonetheless, we do wish to sound a cautionary note. Considerable publicity has been given to a number of "bad" cases of gazumping, and it is understandable that the general public wish to have action taken to prevent such cases from occuring in the future; but changes in the law are apt to have more widespread effect, with unhappy consequences in particular cases.

Sanctions and remedies - The field of choice

53. The legislative approach could be on the basis of either criminal or civil liability. It would be theoretically possible to create a criminal sanction by making the withdrawal from a "subject to contract" agreement a criminal

offence in certain defined circumstances. On the civil side, there is a whole range of possibilities from (at the higher end) treating such an agreement as bringing into existence a binding contract for the sale of the house in question and so bringing into play the fullest measure of civil remedies, to (at the lower) merely making provision for the reimbursement, to the party who has been let down, of any expenses, such as legal and surveyors' fees, which he may have incurred since the "subject to contract" agree-

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CORRECTION

Page 37, LAST LINE

Insert "second" *Before* "reading"

Law Commission

July, 1973.

LONDON: HER MAJESTY'S STATIONERY OFFICE: 1973.

ment of either kind. It could be an offence to sell or attempt to sell elsewhere at a higher price once an agreement of either kind had been entered into. The Abolition of Gazumping and Kindred Practices Bill introduced in 1971 by Mr Kevin McNamara, M.P., proposed (among other things) that where a seller had agreed, whether subject to contract or otherwise, to sell a house to a particular person at a particular price, it would be a criminal offence for the seller to increase the price or to sell it to anybody else at a higher price unless he paid all the fees and expenses of the disappointed buyer. The Bill failed to secure a reading.

55. We do not think that legislation making it a criminal offence simply to break a contract for the sale of a house would be acceptable; it follows that any proposal to make the breaking of a "subject to contract" agreement a criminal offence would be even less acceptable. If the criminal law were to be introduced into this area it would have to aim at attempts (but only unjustifiable attempts) to raise the price or to sell elsewhere at a higher price after agreeing a price (whether "subject to contract" or not). The definition of what is unjustifiable would obviously give rise to difficulties. What would be the advantages of creating new crimes for this purpose? It would make it clear that the law frowned on the conduct to be proscribed. It would give solicitors and estate agents a clear legal basis on which to advise clients not to gazump. It would, also, put the position of trustees and mortgagees beyond question since they could never be obliged to break the criminal law in the interests of persons beneficially interested.[28] As will appear below, it is at least doubtful whether these advantages could be attained by use of the civil law without criminal sanctions. A further advantage often possessed by the criminal law over the civil law is that it does not depend on the private action of an aggrieved individual for its enforcement, but it is difficult to see how public authorities could become aware of offences without the specific complaint of the aggrieved buyer, and even he may not be in possession of all the relevant facts. A complex system of registration of "subject to contract" agreements and contracts of sale would no doubt be possible, but setting up elaborate machinery for this purpose would hardly be justified unless gazumping existed on a very wide scale; moreover, this would involve the creation of yet further criminal offences to to compel registration.

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28. See para. 77, below.

56. There are, however, strong arguments against the use of the criminal law in this sphere. The possibilities we have canvassed are directed against sellers, not against buyers. It seems unfair to invoke the criminal law against a seller who goes back on his word to obtain more money while leaving the buyer free to resile in order to pay less. No doubt that could also be made an offence: but since the buyer often makes his offer "subject to contract" in order not to be bound before he has taken professional advice, it would be wrong to prevent the buyer from withdrawing for good reason, so it is difficult to see how the sanction could effectively operate against the buyer.

57. Another matter to be borne in mind is that any acceptable definition of the criminal offence is likely to permit a seller who is professionally advised so to conduct himself that he avoids falling within the scope of the legislation at a stage before the exchange of contracts. For example, if the offence required the agreement of a price or announcement of willingness to agree that price followed by an attempt to secure a higher price, a seller might be advised not to agree or name a price until contracts are exchanged, but to do no more than express his willingness to consider an offer from a prospective buyer at or above a stated sum. It would be difficult to describe his subsequent acceptance of someone else's higher offer as gazumping. In so far as criticism of gazumping comes from disappointed buyers who feel let down by the unenforceability of the agreement "subject to contract", that criticism would be met for there would be no excuse for any potential buyer to think that he had secured the seller's agreement. But the overall position of buyers would not, we think, be improved. At present a buyer can generally rely on the seller's agreement of a price even though it is "subject to contract", though he may ocassionally be gazumped. If, however, sellers cease to use "subject to contract" agreements buyers would be subject to general uncertainty as to the price until the seller had exchanged contracts.

58. Sellers who delayed in taking advice might however continue to use the "subject to contract" formula. They would therefore be within the legislation. Yet it would be paradoxical that a procedure devised, as we have explained, to keep the parties free from legal obligations until they have taken professional advice and their advisers have concluded their preliminary investigations and negotiations should result in the unadvised seller becoming subject to criminal sanctions which he could have avoided had he been advised.

59. The creation of a new criminal offence in this area which has hitherto been predominantly the province of the civil law is something which requires very clear justification. The disadvantages of the criminal law, and the anomalies to which it could give rise, lead us to the provisional view that criminal sanctions should not be recommended.

(b) Making "subject to contract" agreements legally binding as contracts

60. Apart from any criminal sanction, the most effective deterrent to withdrawal from a "subject to contract" agreement would be the knowledge that the other party could enforce it as if it were a legally binding contract. If the seller withdrew, the buyer would then be able to obtain an order for specific performance or an award of damages. If the buyer withdrew the seller would be entitled to damages, or to rescind the contract and keep the deposit.

61. In considering whether or not an agreement "subject to contract" should be treated as if it were a legally binding contract it is, we think, important to bear in mind that, for the reasons which we have discussed in Part B of this paper, one (or perhaps both) of the parties did not wish to enter into a legally binding contract at that stage. This means that the transaction is still under negotiation. It is not normally expected that failure to bring negotiations to

fruition should give rise to legal consequences; the purpose of negotiating is to enable the parties to find out whether they can arrive at a contract or not. The fact that in the course of the discussions they have agreed on certain matters does not stop either reopening such matters. This is as true of negotiations for the sale of houses as of any other negotiations. An agreement made "subject to contract" to sell and purchase a house at a particular price does not amount in law to a legally binding contract, notwithstanding that one of the main terms, the price, has been apparently settled. It is well established that the matter remains in negotiation until a formal contract is settled and formal contracts are exchanged.[29] The question which has to be answered, therefore, is whether there is something so special about the sale and purchase of dwelling houses that agreement of price alone should be sufficient to bring a binding contract into existence. Does the fact that the present law makes it possible for one party to a "subject to contract" agreement to withdraw from it at will justify the deliberate creation of an exception to the general rule? Is the remedy which we are here considering reasonably proportionate to the problem?

62. There are, clearly, two objections to treating a "subject to contract" agreement as an actual contract. We have already indicated the first, which is that any such solution would be entirely contrary to fundamental principles of the law of contract. If the parties had wished to be mutually bound there was nothing to prevent them from having come to an appropriate agreement; since they chose not to make such an agreement, one should not be made for them.

63. The second objection is a practical one. It would be necessary, if such an agreement were to be enforceable, to know precisely the terms on which the parties could enforce it,

29. See for example Keppell v. Wheeler [1927] 1 K.B. 577 (C.A.) per Bankes L.J. at 584.

bearing in mind that the only term which may have been agreed is the price. In simple cases, it may be that terms fair to the parties could be worked out by the court or by an arbitrator; but many cases are not simple. Moreover, if the agreement were to constitute a binding contract, both parties ought to be bound by it, and this raises great difficulties especially in connection with enforcement against a buyer. In constructing the terms of the contract (other than the price) the court or arbitrator would be faced with the problems which we have already discussed in connection with standard forms of conditional contract. The constructed contract would have to contain at least some of the conditions which a professionally advised buyer require for his own protection; but the contract would also have to be acceptable to the seller and it would hardly be so if the buyer were fully safeguarded since the contract would amount to little more than an option in favour of the buyer to purchase the property at the agreed price.[30]

(c) Reimbursement of expenses

64. If it is thought that the parties to a "subject to contract" agreement should not be entitled to enforce the agreement as if there had been a binding contract, should the party responsible for the breakdown of negotiations be liable to pay something by way of compensation? It has been suggested that a person who has been let down by the unreasonable withdrawal of the other party ought, at least, to be able to recover the amount of any expenditure which he has reasonably incurred in the expectation that a contract would result from the negotiations. Such a suggestion has been made and worked out in considerable detail by the Law Reform Committee of the Bar Council, to whom we are extremely grateful.[31]

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30. Conditional contracts are discussed paras. 41 to 51 above.

31. It should be mentioned that the view of the Committee was that legislation was not desirable in this field but that if it were to be thought necessary, it should be confined to giving to the injured party the right to recover his abortive expenditure.

65. This suggestion, unlike the one which would attempt to make a contract out of something that was evidently not a contract, is not open to attack on grounds of principle. It seems to us to be a fully defensible development of the law along lines which are gaining increasing acceptance. The seller of a house must be taken to know that, under the existing procedure, his acceptance of a "subject to contract" offer will be the signal for the buyer to start incurring expenses,[32] and that if he withdraws from the negotiations, the buyer will have thrown away those costs. Similarly the buyer should appreciate that if he withdraws, the seller may have to incur additional expenses before securing another buyer. In either case, if the withdrawal is unreasonable in the circumstances, should not the party who has withdrawn reimburse the other in respect of expenses which would not have been thrown away, or incurred, but for the breakdown of the negotiations?

66. Reasonable though that suggestion may be, the usefulness of a statutory provision to give effect to it must be judged in the light of the fact that the sum at stake in the average case would be unlikely to exceed £50, and it would usually be less. It is abundantly plain that reimbursement of expenses alone would not eliminate gazumping. The higher offer can be counted upon to exceed the amount of the expenses in question[33] and it would usually be in the seller's interest to accept such higher offer and to pay the first buyer's expenses without demur.

67. Liability to reimburse might attach, we have said, to "unreasonable withdrawal" from negotiations. The statute could hardly define "unreasonable"; but it would, we think, have to

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32. E.g. Search fees, the Building Society's surveyor's fees, solicitor's costs.

33. While working on this topic we read in the press of a case where the asking price of a flat rose from £12,750 to £15,000 in the space of five weeks.

indicate that the concept of "withdrawal" included conduct by one party calculated to cause the other party to break off the negotiations. In the event of dispute, therefore, the whole course of the negotiations would call for investigation. It is also to be borne in mind that if a cause of action along these lines were recognised, it could affect cases in which nothing even remotely like a "gazump" had occurred.

(d) Compensation for disappointment

68. Since the practical advantages of creating a liability simply to reimburse expenses are so limited, the question arises whether, instead of (or in addition to) that, the law should provide a potentially more extensive remedy, falling short of the remedies which would be available if the "subject to contract" agreement were treated as a binding contract. For instance, should one party to negotiations for the sale and purchase of a dwelling house be entitled to recover from the other who has let him down a monetary recompense for his being annoyed, inconvenienced or disappointed?

69. A right to recover on this basis would undoubtedly be a novelty. As a matter of classification it could not be regarded as a right founded on contract; it appears to be a right independent of agreement. As a matter of legal theory, therefore, the basis of any such right would necessarily be that unreasonable withdrawal from "subject to contract" agreements was unlawful - in the same sense as libel, for example, is unlawful. To use lawyer's language, there would be a new, statutory, tort.

70. The assessment of damages under such a head would not be an easy matter. Since there is, by definition, no contract in the background, the injury being made good would be of an intangible nature (disappointment etc), and not a loss of bargain. Inevitably, a change in the law in this direction

would create an area of uncertainty, and it would be impossible to avoid an element of arbitrariness in the assessment of damages.[34] At the same time, it is clear that there should be a ceiling to any award under this head, because financial recompense for disappointment over a hoped-for contract could not properly exceed the contractual damages which would have been payable if there had actually been a contract and that contract had been repudiated. What those damages would have been (on the given hypothesis) it is almost impossible to tell because, as we have already indicated,[35] it is very difficult to construct for the parties a contract which was never in fact made.

(e) Further general considerations

71. From the foregoing discussion of the possible bases on which to found statutory remedies it will be apparent why we said in paragraph 52 that we were not convinced that the answer to the gazumping problem lies in legislation. But if legislation is introduced along any of those lines, answers to other questions will have to be provided.

(i) Should the legislation be directed only against sellers?

72. Throughout this Paper our minds have been primarily directed to gazumping, that is to say to withdrawals by sellers from "subject to contract" agreements in order to get a higher price. But our terms of reference are not so limited and it often happens that negotiations are broken off by the buyer. It may be that in sellers' market conditions, a buyer is relatively less likely to withdraw without good cause; but if a buyer has entered into a "subject to contract" agreement solely with a view to keeping his

34. Libel actions, which lie in respect of similar intangible injuries (viz, to reputation), give rise to the same difficulty.

35. See para. 63 above.

options open, and then declines to proceed because he has found another house which suits him better, it is hardly fair that the legislation should not be equally capable of applying in favour of the seller.

73. On the other hand, the "subject to contract" procedure has, as we have shown, grown up because it is primarily buyers who require to be protected in the initial negotiating stages. This leads us to the next question.

(ii) By what standard should conduct be judged?

74. It seems clear to us that refusal to proceed with a "subject to contract" agreement should not of itself give rise to statutory consequences. The buyer may find something seriously wrong with the house, or he may unexpectedly find that he is unable to obtain the necessary mortgage. Similarly, a seller must, we think, be free to withdraw if his buyer is very dilatory; and unadvised sellers should, perhaps, have some protection against being taken advantage of by land speculators. The statutory remedies should therefore be available only in cases where withdrawal was unreasonable. Is the test of "reasonableness" to be subjective, or objective? If subjective, the statute would not cure gazumping, because from the seller's point of view it may not be unreasonable that he should try to obtain the highest price for his house that the market will provide. On the other hand, if the test is an objective one, the buyer may find himself obliged to proceed with a transaction notwithstanding that on inspection of the property and on making the usual enquiries and searches he has discovered matters which, for purely personal reasons, he regards as wholly unacceptable. The resolution of this problem would appear to involve the acceptance either of double standards or of an objective standard in relation to sellers coupled with an exclusion of buyers from the effect of the legislation altogether. Neither solution gives us any sense of satisfaction.

(iii) What should be the characteristics of the agreements to which the statute should apply?

75. We have spoken throughout of "subject to contract" agreements, and any legislation would have to define this. The essential matter, it seems to us, is agreement of the price - in the absence of any such agreement, people do not, we think, feel that they have been let down or gazumped. In many cases there will be a written memorandum of some sort, in which a firm price is stated and the formula "subject to contract" is used. Such cases are clear. But what if the price is subject to variation (as it may well be if the agreement relates to a house which has yet to be built)? If the price were, by agreement, variable because of increasing building costs, should the builder be required to account in detail for the increase? Should an agreement within the statute be deemed to exist if a deposit or registration fee has been paid and accepted, even if there is no firm agreed price? The draftsman of any legislation would require clear instructions on matters of this sort.

(iv) Is it a relevant consideration that the party who claims to have been let down may himself not have been able to proceed with the transaction?

76. Let it be supposed that a buyer and seller have agreed "subject to contract" on the sale of a house at a price of £10,000, and that the seller subsequently seeks to raise the price to £12,000. Prima facie, the buyer might be entitled to some remedy on those facts. But many people, we think, would hesitate to give the buyer a remedy if there were doubts as to the buyer's own willingness or ability to proceed with the transaction as originally agreed. There might, for example, be a question as to the buyer's ability to raise the agreed £10,000 purchase money. This aspect of the matter would

be of particular concern if the statutory remedy took the form either of the reimbursement of expenses or of compensation for disappointment, because it could not be said with certainty that the expenses were thrown away, or the disappointment suffered, as a result of the seller's action alone. If the claimant's ability to proceed is a consideration to be taken into account, should the burden be put on the other party to prove the negative by way of defence (an often impossible task), or is it up to the claimant to show positively that he would have proceeded (again, an often impossible task for a buyer because the negotiations may have broken off before he had had an opportunity to make his enquiries and arrange his mortgage)?

(v) Should the legislation affect trustees or building societies?

77. It is open to question whether the legislation should apply to a trustee or a building society selling under its power of sale because the seller, in that case, is not the beneficial owner of the property. It is settled law that a trustee is bound in the interests of his beneficiaries to get the best price reasonably obtainable if he sells the trust property and a building society selling under its power of sale is under a similar obligation.[36] On the other hand it would perhaps be wrong to put a buyer dealing with a person in a fiduciary capacity in a weaker position than a buyer from any other class of seller.[37] A trustee should not agree, even subject to contract, to sell at too low a price. In any event the trustee can protect himself by putting the property up for auction or selling it by tender.

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36. Building Societies Act 1962, s. 36(1)(a) and see Buttle v. Saunders [1950] 2 All E.R. 193.

37. The position of vendor charitable trustees may need special consideration.

(vi) Should it be possible for the parties to exclude the effect of the legislation by agreement?

78. Almost certainly, the answer to this question would have to be in the negative if the legislation were to have any real value. But it is a strong thing to say to persons who are in the course of negotiation that they shall not be entitled to agree on the consequences, as between themselves, of failure to reach final agreement. Furthermore, if hard cases are to be avoided, it would seem that the legislation would have to grant the court a wide discretion to do what, in all the circumstances, is fair in each particular case; and that would introduce a considerable degree of uncertainty.

(vii) Should a written memorandum be necessary?

79. Finally, we must draw attention to the fact that a contract for the sale of land requires to be supported by a memorandum in writing if it is to be enforceable.[38] The question arises as to whether that rule should be extended to agreements "subject to contract" if the latter are to have enforceable legal consequences. If such agreements were, by statute, to be treated as though they were contracts, the rule might apply anyway; but if the statutory remedy took some other form it would, apparently, not apply. It would seem anomalous that an agreement which was not a contract should be more readily enforceable than an actual contract; on the other hand, if the availability of a remedy in the cases with which we are concerned were also dependent on the existence of a memorandum in writing, a considerable loophole would exist. One might almost as well permit "contracting out". This is by no means a simple matter, because any difference in treatment between contracts and agreements

38. Law of Property Act 1925, s. 40.

"subject to contract" would invite the argument that a contract which was unenforceable for want of a memorandum should be treated as if it were a mere agreement, and so enforceable (to some extent at least) by virtue of the legislation under discussion.[39]

D. GENERAL SUMMARY

80. In this Paper we have described the practice which is normally followed in the sale and purchase of a dwelling-house, and we have explained the reasons for that practice. We recognise that that practice is open to criticism in that it enables either party to the negotiations to withdraw at any time before a contract is finally concluded, whether for good cause or not, and whether or not the other party has been induced by an agreement "subject to contract" to incur expenses. As recent experience has shown, this freedom to withdraw can give rise, in abnormal market conditions, to public concern. But we have found that freedom to withdraw is a practical necessity if buyers are not to be placed in an exposed position.

81. Because of the public concern, we approached this subject in the hope that we might be able to put forward positive proposals, either for the reform of the practice or for the reform of the underlying law, aimed at solving the problem that has arisen. We have, however, been driven to the conclusion that the cause of the problem lies outside the law and the practice, and that there are clear dangers in altering a system which has been carefully designed, and which serves its purpose well in the vast majority of cases, solely for the reason that in exceptional (and perhaps temporary) circumstances the system is capable of being used unscrupulously. We have, therefore, discussed the possibilities, and

39. If this argument were accepted, the purchaser in Law v. Jones [1973] 2 W.L.R. 994 might have had some remedy even if the Court had held that the correspondence between the solicitors did not constitute a sufficient memorandum of his oral contract.

some of the difficulties; but we have decided not to put forward positive proposals.

82. Conduct disapproved of by the community at large sometimes takes forms against which the law is not an appropriate weapon. In our view, gazumping lies very largely in the area in which reliance must be placed on social and moral restraints, and is outside the field proper to legal intervention. Changes in the law designed to deal with such matters are apt to create more problems than they solve. Of the several legislative approaches which we have discussed in this Paper, the only one which fits the general pattern of the law is, it seems to us, that considered in paragraphs 64-67, namely that a party to an agreement "subject to contract" who has unreasonably let the other down should be liable to reimburse that other his expenses abortively incurred. But we feel unable positively to suggest that even that limited proposal should be adopted, for the simple reason that it might well prove to be counter-productive. In many instances, sellers are deterred from gazumping by moral considerations; but if the law were changed as suggested it could not fail to give the impression that a seller is actually entitled to gazump, provided that he offers to pay the buyer's expenses. By lending gazumping an air of legal respectability, the restraints imposed by moral pressures would be lost.

APPENDIX

Extracts from a Memorandum (dated May 1964) by the Council of The Law Society on the use of options and provisional contracts to replace deposits subject to contract.

This Memorandum was submitted at the request of the Lord Chancellor's office in May, 1964, and is intended to deal with cases where a purchaser finds the house through an estate agent or by direct contact with the vendor, and not with the sale of houses on building estates nor with sales by auction.

Options and provisional agreements are not unusual in the sale of larger special properties where the purchaser wishes to be sure that the property is suitable for his particular purposes before being finally bound by a contract. If such options or provisional agreements were to become common practice in the sale and purchase of small private dwelling-houses, they should fulfil the following conditions:-

(1) Be short and simple and capable of being readily understood without legal advice.

(2) Not carry such penalties as would make it improper to ask the vendor or the purchaser to sign the same without legal advice.

(3) Contain a number of grounds on which the vendor or the purchaser in particular can rescind the same without penalty.

Such an option or provisional agreement is bound to be an unsatisfactory document, but nevertheless the idea might appear prima facie to offer advantages over the present complete uncertainty which exists between agreement of terms and exchange of contracts. Whether this is true or not is examined below.

An option agreement or provisional agreement, which binds the vendor to sell if the option is exercised or a particular condition fulfilled, is regarded as inappropriate in the sale of dwelling-houses by private treaty. A vendor would be unwise to enter into such an agreement before being properly advised; if the consideration paid for the option

or the penalty in the case of a provisional agreement were sufficient to make it effective, the purchaser would be in a similar position. In the result, substantially the same time would be taken in preparing and settling such a document as would be necessary for a normal contract.

Although the view is taken that the use of such an agreement would be of no real benefit to the public nor improve the present practice in conveyancing, a possible form of provisional agreement is contained in the Appendix in order to provide a concrete example of the problems involved. This form of provisional agreement is similar to an option agreement, but differs from it in that it entitles the vendor in certain circumstances to rescind the agreement.

While a form on these lines might be thought to remove the present uncertainty between the time when terms are agreed and the time when a binding contract is entered into, The Law Society feels unable to recommend its adoption for the following reasons:-

(1) The form is probably as simple as can be formulated, but it cannot escape being a complex and technical document to the layman, who will not readily understand its full meaning and may well be deceived into thinking that it is a binding contract for sale and purchase.

(2) The Law Society has always taken the view that no contract or similar type of agreement in relation to the sale of land should be signed without legal advice. A document such as that attached would be of little practical use, unless it can be signed without such advice.

(3) The necessary penalty (by way of forfeiture of the deposit), although not very great, is not one which many purchasers of small house property can either afford or be willing to risk losing, and no solicitor would normally advise his client to take such risk.

(4) The use of this form will do little to remove the existing uncertainty under current practice.

(5) An agreement of this nature, even if rescinded or not proceeded with, might give rise to a claim by a vendor's estate agent for commission, having regard to the trend shown by some recent decisions, in particular, the case of Scheggia v. Gradwell [1963] 1 W.L.R. 1049. It must be borne in mind that any form of provisional agreement would frequently be signed in an estate agent's office without legal advice (see para. (2)

above) and vendors would certainly not contemplate any claim to commission arising at that stage.

Possible Form of Provisional Agreement for the Sale and Purchase of a Private Dwelling-house.

(Not recommended for actual use)

AGREEMENT made the day of 196 between A.B. (Vendor) and C.D. (Purchaser)

1. The Vendor agrees to sell and the Purchaser agrees to buy Number 23 Laburnum Avenue (the property) for the sum of £3,000 of which 1% thereof has been paid to (Vendor's solicitor or agent) as a deposit in part payment of the purchase money. The deposit shall be held by the agent as stakeholder.

2. The property is freehold/leasehold for a term of approximately 70 years unexpired at a ground rent of £5 a year.

3. The Vendor warrants:-

(a) That he has a good marketable title to the property.

(b) That there are no restrictive covenants easements or rights affecting the property which will materially depreciate its value as a private dwelling-house or its use as such.

(c) That no information received in reply to enquiries of Local Authorities and no entry in the registers of local land charges materially affect the value of the property or its use as a private dwelling-house.

4. This Agreement is conditional upon the parties within five weeks of the date hereof entering into a binding contract for the sale and purchase of the property with vacant possession on completion. If the Purchaser fails to sign such contract the deposit shall be forfeited to the Vendor. If the Vendor fails to sign such contract, he shall pay a sum equal to the deposit, to the Purchaser and repay the deposit. There shall be no right of either party to other damages or costs or to claim specific performance.

5. This Agreement is conditional upon an offer of an advance being made to the Purchaser on normal Building Society terms of not less than £2,500 repayable over not less than 20 years.

6. Either the Vendor or Purchaser may at any time rescind this Agreement without cause by notice in writing. If rescinded by the Purchaser the deposit shall be forfeited to the Vendor and if rescinded by the Vendor the notice of rescission shall be accompanied by payment of an amount equal to the deposit and repayment of the deposit.

7. This Agreement may be rescinded by the Purchaser at or after the date for entering into a formal contract if —

(a) there shall be any breach of the warranties by the Vendor contained in Clause 3 or

(b) if the offer of the mortgage advance referred to in Clause 5 is not made and in either event the deposit shall be repaid to the Purchaser and there shall be no other claim by the Vendor or the Purchaser for costs damages or specific performance.

8. Any dispute or difference touching this Agreement shall be referred to an arbitrator appointed by the President for the time being of the Local Law Society in whose area the property is situate.

As witness the hands of the parties
Receipt for Deposit

Warning— The purchaser of the property is warned that it is extremely unwise for him to sign this document if there is any alteration whatsoever to the printed wording (other than the filling in of blanks). The purchaser is warned that any alteration (other than the filling in of blanks), however slight, may result in serious legal liabilities being cast upon the purchaser. If the purchaser is in any doubt whatsoever, he should consult his solicitor before signing this document.

Printed in England for Her Majesty's Stationery Office by Swift (P&D)Ltd. London EC1M 5RE.

Dd 506384 K20 7/73